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R.J. Reynolds Tobacco Company

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

AFRICAN AMERICAN TOBACCO
CONTROL LEADERSHIP COUNCIL,
ACTION ON SMOKING AND HEALTH,
NATIONAL MEDICAL ASSOCIATION, and
AMERICAN MEDICAL ASSOCIATION,

Plaintiffs,

v.

U.S. DEPARTMENT OF HEALTH AND
HUMAN SERVICES; XAVIER BECERRA,
in his official capacity as Secretary of the U.S.
Department of Health and Human Services;
U.S. FOOD AND DRUG
ADMINISTRATION; ROBERT CALIFF, in
his official capacity as Commissioner of the
U.S. Food and Drug Administration; CENTER
FOR TOBACCO PRODUCTS; and BRIAN
KING in his official capacity as the Center for
Tobacco Products, Director,

Defendants.

Case No. 4:24-cv-1992-HSG

**MOTION OF R.J. REYNOLDS
TOBACCO COMPANY FOR LEAVE
TO FILE AMICUS CURIAE BRIEF IN
SUPPORT OF DEFENDANTS'
MOTION TO DISMISS**

Date: September 12, 2024
Time: 2:00 p.m.
Judge: The Hon. Haywood S. Gilliam, Jr.
Place: Oakland, Courtroom 2, 4th Floor

1 R.J. Reynolds Tobacco Company (“Reynolds”) hereby requests permission to file the
 2 attached brief of amicus curiae. This brief supports defendants’ motion to dismiss the complaint in
 3 this action, calendared for a hearing before this Court on September 12, 2024 at 2:00 PM. Reynolds
 4 believes it can assist the Court in resolving the question raised by plaintiffs’ complaint: whether
 5 this Court can and should compel defendants to issue the proposed menthol ban.

6 **LEGAL STANDARD**

7 The question of allowing amicus participation is within the district court’s “broad
 8 discretion,” and “generally courts have ‘exercised great liberality’ in permitting amicus briefs.”
 9 *California v. U.S. Dep’t of Interior*, 381 F. Supp. 3d 1153, 1164 (N.D. Cal. 2019) (citations
 10 omitted). “There are no strict prerequisites that must be established prior to qualifying for amicus
 11 status,” and a potential amicus “must merely make a showing that his participation is useful or
 12 otherwise desirable to the court.” *Id.* Moreover, an amicus brief should “normally be allowed”
 13 when the amicus has an interest “that may be affected by the decision in the present case.”
 14 *Washington v. FDA*, 668 F. Supp. 3d 1125, 1144 (E.D. Wash. 2023) (citation omitted); *see also In*
 15 *re Heath*, 331 B.R. 424, 430 (B.A.P. 9th Cir. 2005) (quoting *Ryan v. CFTC*, 125 F.3d 1062, 1063
 16 (7th Cir. 1997)) (similar); *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, 355 F. Supp. 2d
 17 1061, 1067 (N.D. Cal. 2005) (“District courts frequently welcome amicus briefs from non-parties
 18 concerning legal issues that have potential ramifications beyond the parties directly involved”).

19 **I. PROPOSED AMICUS HAS AN INTEREST IN THIS CASE**

20 In this suit, plaintiffs seek a court order forcing FDA to issue its proposed ban on menthol
 21 cigarettes. FAC ¶ 14; *see Tobacco Product Standard for Menthol in Cigarettes*, 87 Fed. Reg.
 22 26,454 (May 4, 2022). Reynolds has a direct interest in this issue because it is the second largest
 23 domestic cigarette manufacturer, and its Newport brand is the top-selling menthol cigarette brand
 24 in the United States. Reynolds opposes the proposed menthol rule and instead supports the
 25 framework of tobacco harm reduction (“THR”), a policy embraced by many in public health. THR
 26 counsels that the best way to further reduce the health consequences of cigarette smoking is to
 27 provide adult smokers with accurate science-based information about alternative tobacco product
 28

1 choices that may present less risk, and to encourage smokers to consider switching to those
2 alternatives if they do not want to quit outright.

3 During the comment period, Reynolds submitted a detailed comment explaining its
4 concerns about the proposed rule. *See* Comment from RAI Services Company, Dkt. No. FDA-
5 2021-N-1349-175111 (Aug. 1, 2022), <https://tinyurl.com/r4uxzn9x>. And it has met with OIRA
6 both at the proposed rule stage and the final rule stage. *See* OIRA, *View EO 12866 Meeting 0910-*
7 *AI60*, <https://tinyurl.com/mrywh6us>; OIRA, *View EO 12866 Meeting 0910-AI60*,
8 <https://tinyurl.com/bdff42kp>.

9 **II. PARTICIPATION BY AMICUS WILL BE USEFUL TO THE COURT**

10 Reynolds’s participation would be useful to this Court because Reynolds fulfills the “classic
11 role” of amicus curiae. *Miller-Wohl Co. v. Comm’r of Labor & Indus. State of Mont.*, 694 F.2d
12 203, 204 (9th Cir. 1982). First, this case is undoubtedly one of “general public interest.” *Id.*
13 Indeed, as Secretary Becerra said, the proposed menthol ban “has garnered historic attention.”
14 Secretary Xavier Becerra, *Secretary Becerra Statement on the Proposed Menthol Cigarette Rule*
15 (Apr. 26, 2024), <https://tinyurl.com/3dpfn8bu> (“Becerra Statement”). Second, Reynolds is well-
16 positioned to supplement the efforts of defendants’ counsel because, as a cigarette manufacturer
17 that has participated in the rulemaking process for the menthol rule, it is familiar with the relevant
18 issues. Finally, Reynolds can draw the Court’s attention to points that would otherwise escape
19 consideration because Reynolds’s perspective on the menthol rule differs from that of defendants.
20 In particular, while defendants are still considering whether issuing the rule is advisable, *see*
21 Becerra Statement, *supra*, Reynolds has taken the position that the menthol ban should not be
22 issued. At any rate, Reynolds’s proposed amicus brief addresses a number of issues that the
23 government’s brief either does not address or addresses in less detail.

24 **CONCLUSION**

25 For reasons set forth above, Reynolds respectfully requests leave to file its proposed amicus
26 curiae brief in support of defendants’ motion to dismiss.

1 Dated: July 9, 2024

JONES DAY

2
3 By: /s/ Edward Patrick Swan, Jr.

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